United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA, Appellee, v. WATSON L. MILLS, and GEORGE F. McDAVID, Appellants.	Docket Nos. 22735-6

BRIEF ON BEHALF OF APPELLANTS RESPECTING THEIR APPEALS FROM CONVICTIONS IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Appointed by this Court

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Statement of Issues Presented

1. Whether appellants were denied their Sixth Amendment rights to counsel by the police "show-up" conducted after their apprehension.
   A. Whether the evidence as to the pre-trial identification was properly admitted.
   B. Whether the tainted in-court identification was properly admitted.
2. Whether appellants were denied due process by the police "show-up".
   A. Whether a "show-up" constitutes a per se denial of due process.
   B. Whether the particular "show-up" conducted in this case constituted a denial of due process.
3. Whether the "show-up comprised "unnecessary delay" in violation of Rule 5(a) of the Federal Rules of Criminal Procedure.

Statement Pursuant to Rule 8(d) of The General Rules of the United States Court of Appeals

This is the first time that this case has been brought before this Court.

References to Rulings

There are no references or rulings presented for review by this Court other than those identified in the text herein relating to the pre-trial events and the events occurring during trial.

Statement of the Case

A. Nature of the Case; Course of the Proceedings; Disposition in the Court Below

This is a case involving two consolidated appeals by Watson L. Mills and George F. McDavid, defendants below in a single combined trial. The Grand Jury for the United States District Court for the District of Columbia had presented defendants for indictment on May 13, 1968. The indictment against both was filed on June 17, 1968. Defendant McDavid pleaded not guilty on June 28, 1968. Defendant Mills pleaded not guilty on July 5, 1968. Both defendants were remanded to the D. C. jail where they have remained incarcerated since their arrest. Each defendant was represented by court-appointed counsel at the trial.

The trial was conducted on October 17-18, 1968 before the Honorable Oliver Gasch, United States District Judge, and a jury on charges, against both defendants, of Robbery and Assault with a Dangerous Weapon. On October 21, 1968 the jury found both Mills and McDavid guilty of having violated 22 D. C. Code § 2901 and 22 D. C. Code, § 502.

On January 3, 1969 Judge Gasch sentenced McDavid to 2 to 10 years on each of the three counts, the sentences to run concurrently. On the same day Mills was committed to the custody of the Attorney

General's office for observation and study pursuant to 18 U. S. C. § 5010(e) (the Federal Youth Correction Act). On March 13, 1969 Judge Gasch sentenced Mills to the custody of the Attorney General pursuant to section 5010-3 of Title 18.

B. Statement of the Relevant Facts

The indictment alleged that on March 21, 1968, at approximately 8:00 in the evening, the store known as David's Mens Wear, Inc., located at Mount Pleasant Street, in the District of Columbia was entered by two men with a pistol. The men allegedly proceeded to take and escape with $600 from the store, $34 from one Leo Falks, the manager thereof, and property in the form of a $5.00 wallet from one John Glenn, an employee.

Subsequently, at 8:35 p. m. of the same day, appellants Mills and McDavid were apprehended by the police at 1708 Lamont Street, a short distance from the David's Mens Wear Store. Although the police searched Mills and McDavid and the surrounding area neither Mills nor McDavid had a gun, anything approximating $634 (one had $14, the other $25), or Glenn's wallet in their possession (Tr. pp. 227-28, 257-58, 266). Nevertheless, the defendants were immediately handcuffed and driven to the store (Tr. pp. 32-33). There, at approximately 8:45 p. m., the defendants were presented, alone and still visibly handcuffed and chained together, to Messrs. Falks and Glenn who concluded that Mills

and McDavid were the culprits who had robbed them (Tr. pp. 20, 34, 37, 281). Neither appellant had the benefit of counsel at or prior to this "show-up".* The police made no attempt, either at that time or subsequently, to arrange a multi-person line-up for Falks and Glenn to view Mills and McDavid along with other persons (Tr. pp. 22, 34-35, 43).

Subsequently, the District Court appointed separate counsel to represent Mills and McDavid at the trial. At that trial, Falks and Glenn testified against both defendants. Although the trial judge had previously ruled that he would exclude such evidence (Tr. pp. 52-53), evidence respecting the identification at the pre-trial "show-up" was admitted (Tr. pp. 299-301, 308-09, 312) and those two witnesses also made in-court identifications of appellants (Tr. pp. 79, 129). Mills took the stand and absolutely denied that either he or McDavid had anything to do with the alleged crime (Tr. pp. 276-302). McDavid did not testify.

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* A "show-up" is the term used to describe the situation in which suspects are shown singly, rather than in a multi-person "line-up" to witnesses.

While the record in this case contains no affirmative extrinsic statements to the effect that appellants had no counsel of any sort at this critical stage of the proceeding, such fact is implicit in all the descriptions of the events supplied by witnesses for both the Government and the appellants (Tr. pp. 276-302, 312). This Court can judicially recognize that to be evident. Appointed counsel has verified such fact from appellants as well as the fact that neither appellant had been informed of his right to counsel. (See attached Affidavit, Exhibit "A" hereto). It is presumed that the Government will not contest this point.

ARGUMENT

POINT I

APPELLANTS' CONVICTIONS SHOULD BE REVERSED BECAUSE THEY WERE DENIED THEIR SIXTH AMENDMENT RIGHTS TO COUNSEL AT THE POLICE "SHOW-UP" CONDUCTED AFTER THEIR APPREHENSION

A. Evidence Relating to the Pre-Trial "Show-Up" Was Improperly Admitted By the Trial Court

The Sixth Amendment to the Constitution of the United States assures to every accused in a criminal prosecution the right to the assistance of counsel for his defense. In Powell v. Alabama, 287 U.S. 45 (1932), the Supreme Court held that this right was important during the time between arraignment and trial because that period was "critical" to the accused's defense. In Escobedo v. Illinois, 378 U. S. 478 (1964), the interrogation of a suspect in police custody was held to be a "critical stage" because the police had clearly proceeded beyond general inquiry to the point of focusing upon a particular individual. And in United States v. Wade, 388 U. S. 218 (1967), and Gilbert v. California, 388 U. S. 263 (1967), the Court ruled that confrontations between suspects and witnesses were a "critical stage" of the criminal proceedings against an accused and counsel must be present at such confrontations unless waived. See also Miranda v. Arizona, 384 U. S. 436 (1966). While the Supreme Court in Stovall v. Denno, 388 U. S. 293 (1967), held that the Wade-Gilbert rule should not be applied

retroactively, that presents no problem in this case where the deprivation of appellants' rights (March 21, 1968) occurred substantially subsequent to the date of the Wade-Gilbert decisions (June 12, 1967).

Pursuant to the above line of cases it is thus well-established that fundamental error of constitutional proportions is committed by allowing testimony into evidence (See Tr. pp. 299-301, 308-09, 312) regarding the out-of-court identification of Mills and McDavid by Falks and Glenn while the former two individuals were unrepresented by counsel. E. g., Rivers v. United States, 400 F. 2d 935 (5th Cir. 1968); United States v. Clark, 294 F. Supp. 44 (D. D. C. 1968). Since Wade-Gilbert, where counsel had been appointed but was absent, it has been ruled that the rule also applies categorically to cases where counsel has not yet been appointed. United States v. Clark, 289 F Supp. 610, 628 (E. D. Pa. 1968).

B. The In-Court Identifications of Mills and McDavid were Improperly Admitted by the Trial Court

The principal bulk of the evidence adduced against appellants at the trial consisted of the identifying testimony of Falks and Glenn. The in-court identification aspect of such evidence should also have been excluded. The suggestive and illegal confrontation back on March 21, 1968 can only be said to have forever tainted the opinions of those two witnesses. Clearly, once a witness has said in unfair circumstances

that "these are the men", stubbornness and the mere social force of embarrassment prevents him from later retracting his statement. At the point of trial effective cross-examination by defense counsel is hopeless, only serving to underscore the witness's dogged adherence to his original conclusion. As the Supreme Court said in Wade:

> "Moreover, '[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial'." 388 U. S. at 229.

As the District Court said in United States v. Kinnard, 294 F. Supp. 288 (D. D. C. 1968):

> " . . . Most reluctantly the Court is required to suppress the identification. The effect of this is to rule out of this proceeding any in-court visual identification by the witnesses who were at the scene, for the Government offered no proof which even suggested that an in-court identification could be accomplished independent of the influence of the improper on-scene confrontation." Id at p. 289.

In Murphy v. Waterfront Comm'n., 378 U. S. 52 (1964), the Supreme Court stated:

> "the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." Id at 79, n. 18.

The Government has in no way sustained such a burden in this case.

POINT II

APPELLANTS' CONVICTIONS SHOULD BE REVERSED BECAUSE THEY WERE DENIED FIFTH AMENDMENT DUE PROCESS BY THE POLICE "SHOW-UP"

In Stovall v. Denno, supra, the Supreme Court held that even apart from the right of an accused to counsel at pre-trial confrontations, such confrontations may be so unnecessarily suggestive and conducive to irreparable mistaken identification as to constitute a denial of due process of law under the Fifth Amendment to the United States Constitution. The Court further articulated the test that the legality of such a confrontation "depends on the totality of circumstances surrounding it." 388 U. S. at 302. See Foster v. California, 37 U.S.L Week 4281 (United States Supreme Court, April 1, 1969); Simmons v. United States, 390 U. S. 377 (1968). Recently, in United States v. O'Connor, 282 F. Supp. 963, 965 (D. D. C. 1968), the District of Columbia District Court outlined certain guidelines under this test, one of which was:

> "Were there any compelling reasons for a prompt confrontation so as to deprive the police of the opportunity of securing other similar individuals for the purpose of holding a lineup?" (Emphasis added.)

In this case the Government presented no compelling reasons why appellants could not have been taken back to the station for a proper line-up.

A. "Show-Ups" Should Be Held to Be Per Se Denials Of Fairness and Due Process

As the Supreme Court noted in Wade-Gilbert, even a "line-up"

creates identifying evidence of dubious validity unless it is conducted with appropriate safeguards. A "show-up", on the other hand, has scant virtue whatsoever. In Wright v. United States, 404 F. 2d 1256 (D. C. Cir. 1968), this Court stopped short of ruling on the per se validity of a show-up when it stated that:

> "We do not reach the question, treated in a dissenting opinion, whether an unjustified failure to conduct a lineup ipso facto works a denial of due process." Id at 1261, n. 28."

It was noted in Stovall that:

> "the practice of showing suspects singly to persons for the purpose of identification and not as a part of a lineup, has been widely condemned." 388 U. S. at 302.

It is respectfully submitted there is no redeeming justification from the point of view of police administration or otherwise, which warrants the practice of "show-ups". A proper lineup can be quickly and easily arranged at the station house. It is certainly as easy to take suspects there as it is to take them to the scene of the crime. No undue delay in identification or enforcement burden exists which can be said to outweigh the necessity to eliminate such an unfair procedure.

B. The Particular "Show-Up" Conducted In This Case Constituted a Denial of Due Process

In the present case, Mills and McDavid were dragged by the police to the clothing store in handcuffs and chained together. Such a presentation was most certainly and only conducive to an "identification" of those two men as the culprits. Such a situation can hardly be

countenanced as a fair alternative to an easily-available proper lineup at the station house, without the presentation of only two suspects, without the handcuffs, unmanacled by a chain and without the strong-arm guard of the policemen. Only such a fair line-up away from the scene of the crime is evidence which is at all reliable in the face of the emotion generated in the victims of a robbery or similar serious crime.

POINT III

APPELLANTS' CONVICTIONS SHOULD BE REVERSED BECAUSE THEY WERE DENIED THEIR RIGHTS PURSUANT TO RULE 5(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 5(a) of the Federal Rules of Criminal Procedure provides that:

> "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States."

It is submitted that the "show-up" conducted by the police comprised "unnecessary delay" within the meaning of Rule 5(a) for the reason that there existed no valid justification for not first returning the appellants to the precinct police station and then, pursuant to a proper lineup wherein appellants should have had the assistance of either formally appointed or interim "substitute" counsel (as suggested by the Supreme Court in Wade-Gilbert, 388 U.S. at 237).

CONCLUSION

The convictions herein should be reversed and the cases remanded for further proceedings consistent with the opinion of this Court.

Respectfully submitted,

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Counsel for Appellants
Appointed by the Court

UNITED STATES OF AMERICA,	:	
	:	
Appellee,	:	
	:	
v.	:	Docket Nos. 22735-6
	:	
WATSON L. MILLS, and GEORGE F. McDAVID,	:	AFFIDAVIT
	:	
	:	
Appellants	:	

DISTRICT OF COLUMBIA, ss:

STEPHEN B. CLARKSON, being suly sworn, deposes and says:

1. I am the court-appointed counsel for appellants herein. I make this affidavit in support of these appeals.

2. On June 19, 1969 I talked with appellants Mills and McDavid separately at the cell block in the United States Court House, John Marshall Place, Washington, D. C. At that time each appellant stated unequivocally to me:

(a) At and during the time of the police-conducted "show-up" on March 21, 1969, neither person, from the time of his apprehension had had the benefit of counsel, either appointed or personally selected;

(b) At and during the time of the "show-up", neither person, from the time of his apprehension, was informed of his right to counsel;

(c) The first time at which either person was informed of his right to counsel was at the precinct police station, subsequent in time to the "show-up" conducted after the apprehension.

Stephen B. Clarkson

Subscribed and sworn to before
me this 20th day of June, 1969.

Norma R De Lacy
Notary Public

Exhibit "A"

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. WATSON L. MILLS and GEORGE F. McDAVID, Appellants.	Docket Nos. 22735-6

REPLY BRIEF OF APPELLANTS RESPECTING THEIR APPEALS FROM CONVICTIONS IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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ARGUMENT

POINT I

THE DECISIONS CITED BY THE UNITED STATES ARE NOT DISPOSITIVE OF THE INSTANT CASE

Not only has the United States attempted to recast the issues raised by appellants and failed to speak directly to the three issues raised by appellants on this appeal, but it is also apparent that the cases cited by the United States do not contravene appellants' positions on those issues.

(1) The Deprivation of Appellants' Rights Under the Sixth Amendment

The United States did not address itself to this issue at all. However, certain of the cases mentioned by the Government do involve this point.

1. The Clemons trilogy. On December 6, 1968 in order to provide additional guidance to trial courts and counsel this Court chose three "identification" cases for particularly extended en banc analysis: Clemons v. United States, Clark v. United States and Hines v. United States. These three cases are reported together at 408 F.2d/1230 (D.C. Cir. 1968). Clemons and Clark are cited by the United States in its brief herein. However, it should be noted that both Clemons and Clark (as well as Hines) involved a pre-Wade confrontation; hence they involved only the Stovall due process considerations, not the Sixth Amendment right-to-counsel issue which is of principal concern to appellants herein.

2. Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969), was a case in which the Sixth Amendment issue was raised in connection with a confrontation which occurred on June 28, 1967, only 16 days after the United States Supreme Court decisions in Wade and Gilbert, before the country's police had been given a reasonable period of time in which to adjust their procedures to meet those decisions. Clearly such justification was not present by March 21, 1968, the time of the show-up in this case. Furthermore, the witness in Russell was not the victim of the crime, as in the present case. Thus more weight could be attributed to the identification. (In this case the robbed person was the store manager who was so upset that he "ran out screaming" into the street after the event (Tr. p. 48).) Even more significantly, the Court noted in Russell that the confrontation took place at 5 o'clock in the morning when there would necessarily be a long delay in summoning counsel and that such constituted a countervailing policy consideration recognized by Wade. In this case the United States adduced no such countervailing consideration before the trial court.

Even on the basis of the much more persuasive case presented by Russell,* the Court could only conclude "with some hesitation", 408 F.2d

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* There the Court of Appeals noted that:

> "The thoroughly experienced trial Judge Youngdahl characterized the circumstances as the strongest case of identific ation he had observed in 16 years on the trial bench." 408 F.2d 1286, n.3.

at 1284, that Wade did not require exclusion of the identification. Appellants reserve that Russell was incorrectly decided and that the Fifth Circuit Court of Appeals in Rivers v. United States, 400 F.2d 935 (5th Cir. 1968) was correct in concluding that Wade:

> "applies to any lineup, to any other techniques employed to produce an identification and a fortiori to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place * * * ."

See also United States v. Kinnard, 294 F. Supp. 44 (D.D.C. 1968) (Gesell, J).

However, even if Russell was correct, it is distinguishable on its facts as set forth above; that expressly narrow ruling does not apply to this case.

3. United States v. Wade, 388 U.S. 218, 240 (1968). The United States cites Wade, upon which appellants rely in their main brief (see also infra), for the proposition that "when the evidence is clear and convincing that the Government's in-court identifications are of independent origin, they will be admitted into evidence despite any constitutionally infirm pre-trial confrontations"* (See United States

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* The United States then attempts to show alleged independent origin and lack of taint by such statements as "The witnesses were sure of their identifications", and transcript citations to such effect. In addition to being irrelevant to that issue, the argument recalls this Court's point in Clemons that "although the positiveness of the witness about an independent base for an in-court identification is a relevant factor, it is to be weighed warily and in the realization that the most assertive witness is not invariably the most reliable one." 408 F.2d at 1242.

brief, p. 4). This is clearly not the holding in Wade, for that case, unlike that presented here, arose prior to any hearing as to independent origin. The Court simply held that a new trial would not be granted "without giving the Government the opportunity to establish" independent origin. 388 U.S. at 240. See further discussion below in POINT II.

(2) The Deprivation of Due Process

The United States mentions Wade, Clark and Clemons which involved allegations of due process deprivations. As raised by appellants in this case this issue is based upon the point that the pre-trial identifications indisputably tainted the in-court identifications by the same individuals. As indicated in appellant's main brief, the United States has the burden* of establishing that the in-court identifications were purged of taint (Appellants main brief, p. 7). In Wade the Court noted that the "conduct of the lineup" was a factor to be considered in respect of this point. 388 U.S. at 241. It is submitted that on the basis of (1) the two-man show-up (2) under terribly suggestive circumstances this Court must declare that as a matter of law the in-court identification in this case cannot be said to be devoid of taint.

In both Clemons and Clark this Court accepted the Stovall "totality of surrounding circumstances" test and examined the particular fact situations therein in great depth. Those fact situations differ substantially

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* See United States v. Wade, 388 U.S. 218, 240, n. 31 (1968).

from that presented here. They are not controlling.

(3) The Deprivation of Appellants' Rights Under F.R.Cr.P. 5(a)

To counter this point the United States cites Kennedy v. United States, 353 F.2d 462 (D.C.Cir. 1965), and Wise v. United States, 383 F.2d 206 (D.C.Cir. 1967), cert. denied, 390 U.S. 964 (1968). Neither is binding on this Court. Kennedy was a pre-Wade case and its holding is not good law in light of the Wade ruling on the right to counsel. In Wise the Court expressly stated that it was not ruling on whether Wade established a Sixth Amendment right to counsel at a confrontation proximate in time and place to the offense. The Court's ruling with respect to F.R.Cr.P. 5(a) in that case was solely with reference to a confrontation which was pre-Wade, hence only Fifth Amendment due process, not Sixth Amendment right to counsel, was involved. This is significant for the reason that one of the very precise reasons for Rule 5(a) is to preserve inviolate the right to counsel (see F.R.Cr.P. 5(b)) not only a general concern for due process. Thus the instant situation presents a much more compelling case under Rule 5 than either Wise or Kennedy.

In connection with Rule 5(a) it should also be noted that the issue is not, as stated by the United States in its issue No. 3., whether the suspects were "returned promptly to the scene of the crime"; it is whether any delay or detour in presenting the suspects to the magistrate,

no matter how "prompt", was justified. The attempt by the United States to justify the suggestive show-up on the basis of sound police and judicial administration--alleged quick identification while memories are still fresh and asserted absence of a "protracted" delay--is most transparent. There was no question here that the suspects could be presented to the witnesses quickly; the only question was how and where. There was no valid reason for presenting the two suspects together* to both witnesses together. There was no valid reason for not conducting a proper confrontation at the station house. The police here had feasible alternatives to the path they chose. Whether the delay was protracted or not is not the point; the delay was simply unnecessary. Yet, it deprived appellants of important Constitutional rights.

POINT II

THE FACTS PRESENTED BY THIS CASE REQUIRED AN ABSOLUTE EXCLUSION OF ALL OF THE IDENTIFICATIONS

In his dissent in United States v. Wade, Mr. Justice White stated that:

> "The Court's opinion is far-reaching. It proceeds first by creating a new per se rule of constitutional law: a criminal suspect cannot be subjected to a pretrial identification process

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* The United States notes (Appellee's brief, p. 7) that another suspect returned to the scene of the crime and was "immediately cleared by witness Glenn". This fact only emphasizes the dubious procedure of presenting the two appellants herein together to the witnesses where it had been reported that two men had committed the crime.

> in the absence of his counsel without violating the Sixth Amendment. If he is, the State may not buttress a later courtroom identification of the witness by any reference to the previous identification. Furthermore, the courtroom identification is not admissible at all unless the State can establish by clear and convincing proof that the testimony is not the fruit of the earlier identification made in the absence of defendant's counsel--admittedly a heavy burden for the State and probably an impossible one. To all intents and purposes, courtroom identifications are barred if pretrial identifications have occurred without counsel being present. 388 U.S. at 251.

Apart from whether Justice White's characterization of the majority's opinion was correct for all cases, it is clear that it is correct on the facts presented by the instant case.

In this respect a portion of the majority opinion in Wade should first be noted:

> "A rule limited solely to the exclusion of testimony concerning identification at the lineup itself, without regard to admissibility of the courtroom identification, would render the right to counsel an empty one. The lineup is most often used, as in the present case, to crystallize the witnesses' identification of the defendant for future reference. We have already noted that the lineup identification will have that effect. The State may then rest upon the witnesses' unequivocal courtroom identification, and not mention the pretrial identification as part of the State's case at trial. Counsel is then in the predicament in which Wade's counsel found himself--realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover and reveal unfairness, while bolstering the government witness' courtroom identification by bringing out and dwelling upon his prior identification. Since counsel's presence at the lineup would equip him to attack not only the lineup identification but the courtroom identification as well, limiting the impact of violation of the right to counsel to exclusion of evidence only of

> identification at the lineup itself disregards a critical element of that right." Id. at 240-41.

The United States in its brief elects to dismiss appellant Mills' first mention to the jury of the pre-trial identification as a mere "voluntary" "trial tactic". It is submitted that this characterization of what transpired at the trial is ill-taken and subsumes some of the important considerations noted by the Wade opinion as set forth above. This position is based upon the following points:

(1) The trial court's decision, at the pre-trial Stovall hearing to allow the introduction of in-court identifications was incorrect and puts defendants in an intolerable, unfair situation. The only method left available to them to attack the in-court identification was to elicit the fact that it might have been derived from the pre-trial confrontation (which the trial court itself had ruled was unfairly suggestive) without the assistance of counsel. Thus appellant Mills' mention of the pretrial confrontation can hardly be called "voluntary". If it was a "trial tactic" (a bald assertion in support of which the United States cites no evidence) it was one which was unfairly imposed on him in violation of procedural due process and his right to counsel.

2. Even if it could be said to be a voluntary trial tactic by Mills, the same cannot be said with respect to appellant McDavid. The subsequent introduction of testimony relating to the pre-trial identification was completely ab initio on the appellee's part with respect to McDavid.

3. The answer to the issue raised in the United States' brief--

"2. May the Government introduce rebuttal evidence in regard to constitutionally infirm identification when defendants [sic--only defendant Mills] avert [sic--"advert"] to the identification in their testimony?" must clearly be no. This Court stated in Clemons that:

> "If it was [an identification] where the court finds that the Sixth Amendment right to counsel existed but was not observed, the prosecution may not, under the per se exclusionary rule enunciated by the Supreme Court in Gilbert, offer such identification as part of its case; . . ." 408 F.2d at 1237.

Thus, even with respect to appellant Mills, it must be held that the Wade requirement that the prosecution shall not be allowed to offer evidence as to any suggestive (as found here by the trial court) pre-trial confrontation without the presence of counsel is a categorical one which precluded the United States from offering the allegedly "rebuttal" evidence as to the pre-trial confrontation.

4. The evidence which the trial court heard to the effect that the in-court identification could have an independent origin must be deemed to be unbelievable as a matter of law and hence incompetent. The pre-trial confrontation was dramatically suggestive. It is illogical to conclude that after such confrontation a person could separate in his mind the basis for his identification. The United States was obliged to establish by at least some independent evidence that such a mental feat was psychologically possible. Absent such evidence the only conclusion which the court can

fairly reach is that the testimony flew in the face of the logical and scientific facts that such mental contortion is highly improbable.

The testimony which the United States adduced allegedly in rebuttal to Mills' mention of the pre-trial confrontation was also inadmissible for the reason that it invaded the interests usually protected by the hearsay rule. In Gilbert v. California, 383 U.S. 263, 272, n. 3 (1968) the Supreme Court stated that in-court testimony as to out-of-court identifications has recently been deemed not to violate the hearsay rule on the basis of the reasoning that the witness was available in the courtroom for cross-examination by defense counsel. But on the facts in this case such reasoning is circular. The very reason that the in-court identification testimony should not have been admitted is that cross-examination in court cannot be effective where counsel was not present at the pre-trial confrontation in order effectively in the first instance to question that identification which can taint all subsequent identifications. Evidence as to either confrontation is therefore of dubious probative value. Because appellants herein were so denied their Sixth Amendment rights to meaningful confrontation at the pre-trial point it is impossible to say that the deprivation was subsequently, at the time of a purported in-court identification, cured.

It would also be unfairly burdensome to take the position that appellants must demonstrate to a trial court or to this Court that the

deprivation of counsel at the pre-trial confrontation specifically prejudiced them with respect to in-court identification testimony. See Gideon v. Wainwright, 372 U. S. 335 (1963), where denial of the right to counsel was held to justify reversal and to require a new trial without any inquiry into whether presence of counsel would have resulted in acquittal; the Supreme Court recognized that the right to counsel had become so fundamental that it should no longer be left to "special circumstances" in each case as was required previously by Betts v. Brady, 316 U.S. 455 (1942). See also Rideau v. Louisiana, 373 U.S. 723 (1963), where a change of venue was ordered without the Court's pausing to examine the transcript of the voir dire examination of members of the jury.

Finally, it is requested that the Court consider this identification issue in the context of certain widely-recognized facts of which this Court can take judicial notice--(1) particularly in some areas of the country there is a tendency for the "witnesses" to be Caucasian and for the "suspects" to be Negro (in the present case the appellants are black and the two men at the store, Falks and Glenn who testified against the appellants, were white), (2) it is more difficult for members of one race clearly to identify members of another than it is for them to identify members of their own race ("All whites look alike;" "all blacks look alike." Such features as wrinkle formation appear to occur in different

fashion in whites, blacks or yellows, making such key identification points as age quite difficult to pinpoint in those of another race.) Not to recognize such correlated facts could tend to make one race a target group for criminal convictions. Such result would be reminiscent of Anatole France's remark that "The law, in all its majestic equality, forbids the rich as well as the poor to sleep under bridges on rainy nights, to beg on the streets and to steal bread."

CONCLUSION

The convictions herein should be reversed and the cases remanded for further proceedings consistent with the opinion of this Court.

Respectfully submitted,

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